

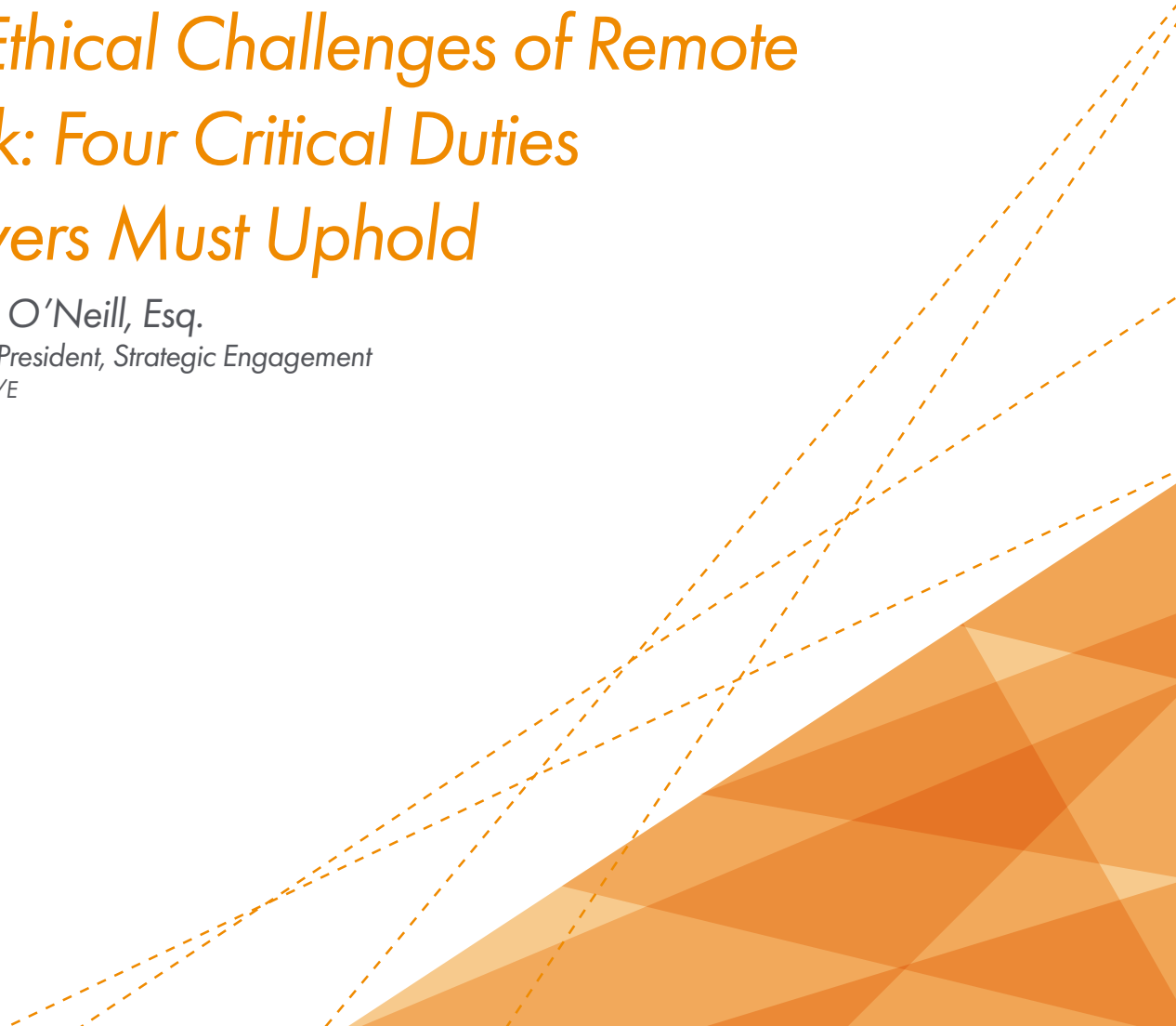


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The Ethical Challenges of Remote Work: Four Critical Duties Lawyers Must Uphold

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As the COVID-19 pandemic spread across the United States, legal professionals were compelled to transition—often with only a few days’ notice—to a work-from-home model. Without plans and protocols at the ready, law firms and corporate legal departments have had to create new models on the fly, all the while keeping in mind the ethical responsibilities borne by lawyers and the teams they supervise.

Here is a summary of the key ABA Model Rules of Professional Conduct that are implicated by remote work, and practical suggestions and strategies for how you can fulfill them.

The Duty of Competence

Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

While full-time remote work may be a new paradigm for many attorneys, they must nonetheless carry out that work competently—and perhaps the biggest challenge is gaining competence with the technology that enables their work. To meet the strictures of [Rule 1.1](#), lawyers aren’t expected to be perfect—the applicable standard is reasonableness. What is reasonable competence for lawyers using technology to work from home under the unprecedented circumstances of COVID-19? According to [Comment 8 to Rule 1.1c](#), “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

To maximize the benefits and simultaneously reduce the risks for clients, lawyers should take the following steps to ensure that they are exercising technological competence:

- **Follow your organization’s policies and procedures.** If your organization has developed new protocols in the wake of COVID-19, be sure to adhere to them. If you believe those protocols need to be adjusted as the situation evolves, make those recommendations to your IT or information security team—don’t go rogue by making unilateral decisions about technology.
- **Evaluate your home technology infrastructure.** Confirm whether you can work effectively and securely from home. Do you have enough devices and the right devices?

Do you have the software and computing power you need to work outside the office? Do you have an up-to-date router with sufficient speed and coverage throughout the home, and do you have enough bandwidth (especially if you are sharing Wi-Fi with a working spouse, roommate, or children)? If you answered no to any of these questions, an upgrade is in order.

- **Ensure you have secure access to all enterprise systems and software that you need.** If your organization does not specify a login protocol, use a virtual private network (“VPN”) to ensure a private, secure connection.
- **Familiarize yourself with videoconferencing tools.** Know how to use these tools effectively, as well as how to reduce their risks. Implement security measures such as setting passwords, requiring people to log in to join a meeting, restricting attendees’ ability to share their screen, and blocking new attendees from joining after the meeting has started. While recording a videoconference call may seem like a convenience, keep in mind that any recordings might be discoverable.
- **Learn how to use your organization’s collaboration platforms and tools.** Secure client portals and tools such as Slack, Skype, Asana, Trello, DocuSign and others, can facilitate remote work. Check with IT to see what platforms and tools are approved for use.
- **Follow cybersecurity best practices.** [ABA Formal Opinion 477R](#) obligates lawyers to understand and use electronic security measures to safeguard client communications and information. These best practices include using strong passwords (and better yet, passphrases), with a unique password for each system, device, and account; enabling multifactor authentication; securing your home Wi-Fi network with passwords and encryption; updating your software regularly; and enabling antivirus software and firewalls.
- **Store data in approved locations; back up data regularly.** Data should only be stored in locations approved by your organization. To the extent it’s permissible to store information on local devices or in personal cloud repositories, be sure those locations are backed up regularly to ensure that your client and practice information is recoverable if you are hacked or experience some other data loss incident.

- **Be aware of cyberthreats.** Scammers are using phishing emails and texts that prey on your concerns and fears around COVID-19 to install malware on your systems or steal your information. Do not disclose or send personal or financial information in email or other online messages. Look for phishing tipoffs in messages such as misspellings, incorrect grammar and awkward syntax. And never open an attachment from an unknown sender or click on a link in an unsolicited email without first investigating its legitimacy.

The Duty of Diligence

Model Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

The coronavirus pandemic poses a number of challenges to maintaining our obligations to diligently represent clients and respond to their requests in a timely fashion, as required by [Rule 1.3](#). Similar difficulties exist with respect to maintaining general competence as effective counselors, as mandated by Rule 1.1. The following are some suggestions that may help lawyers overcome these challenges:

- **Take care of your physical and mental health.** A diligent, competent lawyer must be a healthy lawyer. Do what you can to keep yourself and your family physically healthy. Most of us feel anxious and worried—recognize and respect that stress, and find ways to cope with it, whether it's engaging in physical activity, meditating, reading a book, or socializing with friends on Zoom.
- **Find balance.** It's challenging to balance the practice of law with obligations to your family, friends, and community. Give yourself grace in this process; it's unlikely that you'll be as productive or energetic during this time. After all, we are living through a global health and economic crisis never seen in our lifetimes.
- **Recognize and manage distractions.** Between the 24-hour news cycle, spouses and partners working from home, kids schooling from home, and social distancing requirements, it's easy to get distracted during the workday. Create boundaries and rules around your workday to minimize interruptions, and adjust your hours to accommodate your needs.
- **Adapt your organization's systems and processes to the remote work environment.** Make sure you have access

to the software and documents, whether online or in hard copy, that you need to support your clients. Rely on the assistance resources offered by your firm or company.

- **Maintain your overall professionalism.** While the coronavirus has tested everyone's patience and caused tempers to flare, you should do your part to be courteous and respectful to everyone. Continue to [look the part of a professional](#): while you don't need to dress up in a suit to work from home, don't show up to video conferences in your pajamas. Additionally, accommodate scheduling needs as readily as you can. Finally, work with adversaries to devise mutually agreeable solutions if conflicts arise.
- **Communicate promptly and reasonably with clients.** In addition to Model Rules 1.1 and 1.3, [Model Rule 1.4](#) requires lawyers to keep clients reasonably informed about the status of their matters and to comply with reasonable client requests about their matters. It may be difficult to be as prompt and diligent working from home as when you were working from an office, but set expectations so that clients and colleagues know when they're best able to reach you and how quickly you're likely to respond.

The Duty of Confidentiality

Model Rule 1.6(c): A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

In tandem, Rule 1.1 and [Rule 1.6](#) require lawyers to act competently when safeguarding information that relates to the representation of a client. [Comment 18 to Rule 1.6](#) sets forth factors that determine whether a lawyer's actions constitute reasonable efforts to protect information, depending on "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards and the extent to which the safeguards adversely affect the lawyer's ability to represent clients."

Reasonable efforts to secure information in a remote working environment include the following:

- **Set up a private, secure workplace.** Be aware of others who may hear your conversations or see your private work materials. Don't forget about devices such as Alexa

and Siri; turn them off or have conversations out of their earshot.

- **Adopt a locked screen and clean desk policy.** When you are away from your computer and mobile devices, put them in a password-protected sleep mode. Clean off all papers from your desk. Depending on the sensitivity of the documents, you may want to secure them in a locked cabinet or drawer.
- **Restrict others' use of your business devices.** If possible, do not allow other members of your household to use your devices. If you must share devices, protect your user accounts so no one else can access your profile or [post information to your social media account](#).
- **Establish the privilege—but only when legitimate.** Include privilege-invoking language in your communications and attachments, but don't overdesignate: make sure you reserve privilege labeling for documents that are actually privileged. Also, weigh whether it might be better to communicate privileged or otherwise sensitive information by phone or videoconference rather than in writing. Consider including language invoking the privilege on calendar invitations for virtual meetings as well, and limit invitations to these meetings to reduce the risk of waiving the protection.
- **Follow the best practices for cybersecurity outlined above.**

The Duty of Supervision

Model Rule 5.1(b): A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Model Rule 5.3(b): A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

[Rule 5.1](#) and [Rule 5.3](#) set forth the responsibilities for supervising lawyers and nonlawyers. The standard is the same for both rules: a lawyer must ensure that the lawyers and nonlawyers they supervise act competently and diligently and take steps to avoid compromising confidential information. Here are a few tips for maintaining effective remote relationships with those you supervise:

- **Communicate frequently, clearly, and effectively.** Choose the right communication channel and ensure you give regular guidance to counsel and nonlawyer collaborators. Consider whether to open a dedicated channel, such as Skype or Slack, for ease of communicating online.
- **Check in on a regular schedule.** Set a time on everyone's calendars for a weekly or biweekly review of progress.
- **Explain your availability to teams.** Let your team know when it will be easiest to reach you and whether you cannot be reached during certain times of the day based on your personal or other professional obligations.
- **Require accountability and be accountable in return.** Set deadlines for deliverables and explain when you will respond or share feedback. Be considerate and let others know if you cannot meet a deadline, and don't be surprised if others are facing their own scheduling challenges.
- **Leverage the power of collaboration tools.** Think about how collaboration platforms and technology can make it easier for you to work with a team to share documents, updates, and ideas.

Your ethical obligations as a lawyer demand that you continue to meet these duties—and all the others imposed by applicable rules of ethics—even while we're all working under unprecedented challenges. For additional recommendations on how to provide competent and diligent representation, protect client confidences, and supervise others while working remotely, [check out our on-demand webinar](#).

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